LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 14 1962
JOHN F. DAVIS, CLERK

NO. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIXILYN DRILLING CORPORATION,
Petitioner

v.

CRESCENT TOWING & SALVAGE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston 2, Texas

MENDES & MOUNT
27 William Street
New York 5, New York

E. D. VICKERY
877 San Jacinto Building
Houston 2, Texas

WILBUR H. HECHT
27 William Street
New York 5, New York
Attorneys for Petitioner

December ——, 1962

Alpha Law Brief Co., 402 M & M. Bldg., Houston 2

SUBJECT INDEX

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. No exception to this Court's Admiralty rule of law invalidating contracts releasing towers from liability for their own negligence should be created in this case	13
II. If exception is to be made to Bisso rule, contract must clearly express in unequivocal terms intent of craft being towed to indemnify tower for consequences of tower's own negligence	22
III. If exception to be made to Bisso rule, and if contract is in unequivocal terms, the proper measure of damages is the cost to Crescent of the insurance it had covering the damages to the bridge	34
CONCLUSION	36
CERTIFICATE OF SERVICE	37

LIST OF AUTHORITIES

CASES	PAGE
Alabama Great Southern Railroad Co. v. Louisville & Nashville Co., 224 F.2d 1 (C.A. 5, 1955)	24, 27
Batson-Cook Co. v. Industrial Steel Erectors, 257 F.2d 410 (C.A. 5, 1958)	7, 23, 24, 25
Bisso v. Inland Waterways Corp., 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 (A.M.C. 899 (1955)	2, 7, 8, 9, 10, 14, 15, 16, 19, 21
Boston Metals Co. v. SS Winding Gulf, 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955)	7, 8, 9, 11, 14, 22
Chicago & N.W. Ry. Co. v. Chicago Packaged Fuel Co., 195 F.2d 467 (1952), cert. den., 344 U.S. 832, 97 L.Ed. 648, 73 S.Ct. 39 (1952)	23
Chile Steamship Co. v. The Justine McAllister (S.D. N.Y.), 168 F. Supp. 700 (1958)	17

Employers Casualty Co. v. Howard P. Foley Co., 158 F.2d 363 (C.A. 5, 1947) 32, 33
Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (C.A. 5, 1962) 11, 28
Halliburton Oil Well Cementing Co. v. Paulk, 180 F.2d 79 (C.A. 5, 1950) 24, 26, 32
Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 3 L.Ed.2d 820, 79 S.Ct. 766 (1959) 11, 22, 23
Martin v. American Optical Co., 184 F.2d 528 (C.A. 5, 1950) 24, 26, 32
Miller v. Pennsylvania Railroad Co., 236 F.2d 295 (1956) 23
Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (1947), cert. den., 332 U.S. 700, 92 L.Ed. 355, 68 S.Ct. 82 (1947) 23
North River Barge Line v. Chile S.S. Co., 213 F.2d 882 (1954) 16
Ocean Accident & Guarantee Corp. v. Jansen, 203 F.2d 682 (1953) 23
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232 (1956) 21
Shepherd, W. C., Co. v. Royal Indemnity Co., 192 F.2d 710 (C.A. 5, 1951) 24, 26
Southern Bell Telephone & Telegraph Co. v. Mayor and Board of Aldermen of City of Meridian, Miss., 74 F.2d 983 (C.A. 5, 1935) 24, 26
Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U.S. 411, 3 L.Ed.2d 1334, 79 S.Ct. 1210 1959) 9, 10, 15, 16, 19, 21
Standard Oil Co. of Texas v. Wampler, 218 F. 2d 768 (C.A. 5, 1955) 7, 8, 13, 24, 26, 33, 34, 35, 36
Thomas v. Atlantic Coastline Railroad Co., 201 F.2d 167 (C.A. 5, 1953) 24, 27, 32
Turner Construction Co. v. W. J. Halloran Steel Erection Co., 240 F. 2d 441 (1957) 23

UNITED STATES STATUTES

28 U.S.C. 1254(1) 2

NO. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIXILYN DRILLING CORPORATION,
Petitioner

v.

CRESCENT TOWING & SALVAGE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

Citations To Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (R. 153-170) is reported at 303 F. 2d 237. The opinion of the United States Court of Appeals for the Southern District of Mississippi (R. 138-150) is reported at 198 F. Supp. 788.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1962 (R. 171). The Petition for Writ of Certiorari was filed on August 4, 1962, and was granted Octobe 15, 1962 (R. 172).

Questions Presented

I.

Is an exception to be made to this Court's admiralty rule of law "based on public policy, invalidating contracts, releasing towers from all liability for their negligence."[1]

II.

If such an exception is to be made to this *Bisso* rule, must the contract between the parties clearly express in unequivocal terms their intention for the craft being towed to indemnify the tower from the consequences of the tower's own negligence?[2]

---

[1] Rule quoted directly from **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 90, 99 L. Ed. 911, at page 917, 75 S. Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[2] The Court below held, contrary to eight of its earlier decisions, that such intention no longer had to be expressed in unequivocal terms, but where the contract of indemnity used "doubtful or ambiguous" terms, that the Court would look to the conferences and negotiations and correspondence and the attendant and surrounding circumstances leading up to the execution of the contract in an effort to try to determine the intention of the parties

III.

If such an exception is to be made to this *Inso* rule, and if this contract expresses the intent of the parties in unequivocal terms, what is the proper measure of damages in this case?

Statement

The Petitioner, Dixilyn Drilling Corporation, contracted with the Respondent, Crescent Towing & Salvage Company, to supply the necessary tugs to tow Petitioner's offshore drilling barge, JULIE ANN, down the Mississippi River from Vicksburg, Mississippi to New Orleans, Louisiana. In the course of the towage, one of the legs of the drilling barge struck the Natchez Bridge across the Mississippi River because of the inability of the tugs supplied by Crescent to stop the drilling barge above the bridge until such time as the legs on the drilling barge were lowered to the proper depth to clear the bridge. Crescent supplied three tugs to perform the towage, and it is undisputed that the navigation of the flotilla, consisting of these three tugs and the drilling barge, was completely controlled by Crescent's own pilot, a Captain Brechtel, and that Dixilyn's sole function was to lower the three legs on the drilling barge to the proper depth upon receiving instructions from Crescent's Captain Brechtel to do so.

The owners of the bridge sued Crescent to recover their damages and Crescent impleaded Dixilyn claiming that Dixilyn's negligence caused the damages and in the alternative, that if Crescent was negligent and therefore liable to the bridge owners that Dixilyn had agreed to indemnify Crescent for the consequences of Crescent's own negligence.

A brief description of what transpired up to the time of the damage before stating what the District Court held will probably be helpful to the Court.

In order to navigate the drilling barge under the Natchez Bridge, it was Crescent's plan to turn the flotilla around so that it would be headed up the river in order that the stern of the tug boats and the JULIE ANN would pass under the Natchez Bridge first. Above the bridge, Crescent's Captain Brechtel was to stop the flotilla completely, give the order to lower the legs to Dixilyn's personnel and hold the flotilla in its stopped position at a point well above the bridge until the necessary depth of the legs in the water had been obtained. Crescent's Captain Brechtel's navigational plan called for the lowering of the legs of the JULIE ANN to a depth of fifty-five feet in the water and was to be done in two stages. The legs were first lowered to thirty-five feet at a distance approximately a mile to a mile and a quarter above the bridge. Crescent's Captain Brechtel did not lower the legs to the full fifty-five feet at this time, because of a rock shelf about fifteen hundred feet upstream from the Natchez Bridge which made out from the Mississippi shore, and he did not want to risk damage to the flotilla by taking it across this rock ledge with fifty-five feet of draft on the legs. The decision not to lower the legs to fifty-five feet at the time they were initially lowered to thirty-five feet was made by Crescent's Captain Brechtel as the navigator of the flotilla.

After crossing this rock ledge, Crescent's Captain Brechtel planned to stop the flotilla completely and lower the legs to the desired fifty-five feet. As this would be an additional twenty feet that the legs would have to be lowered into the water, and as the legs lowered at a constant rate of

approximately one foot per minute, this meant that Crescent's Captain Brechtel contemplated holding the flotilla completely stopped after crossing this rock ledge some fifteen hundred feet above the bridge a minimum of twenty minutes while the legs were lowered. After holding the flotilla in this position while the legs were lowered to the contemplated depth, once the desired depth on the legs had been obtained, Crescent's Captain Brechtel then planned to permit the barge to proceed down through the Natchez Bridge.

Obviously the key to the successful consummation of this plan for navigating the drilling barge under the Natchez Bridge was the complete stopping of the flotilla and the holding of it in substantially a fixed position above the bridge for approximately twenty minutes while the last twenty feet of the legs on the JULIE ANN were lowered into the water. The tugs supplied by Crescent were never able to stop the flotilla after it crossed the rock ledge as the District Court found (R. 146), and the bridge was damaged because the flotilla reached the bridge before enough time had elapsed for the legs to be lowered the last twenty feet.

The District Court found as a fact that Crescent's navigational plan failed and the bridge was damaged solely because of the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS. The District Court found Crescent negligent in five particulars:

> 1. Because Crescent failed to supply tugs with sufficient horsepower to completely stop the tow and hold it in the water long enough for the legs on the drilling barge to be lowered to the depth necessary to clear the bridge. (R. 148).

2. Because Crescent furnished the Tug ORLEANS with a defective engine so that it was not able to exert full power because its engine failed above the bridge at the crucial moment. (R. 149).

(Note: While not expressly stated in the District Court's opinion, there can be no dispute as a matter of law the Tug ORLEANS was unseaworthy because of this defective engine.)

3. Because Crescent's Captain Brechtel did not completely stop the flotilla immediately after crossing the rock ledge so that the legs could be lowered to the contemplated depth. (R. 149).

4. Because Crescent's Captain Brechtel did not make a test of the holding power of the tugs with the legs lowered to the contemplated depth well above the bridge before attempting to navigate the flotilla under the bridge. (R. 149).

5. Because Crescent's Captain Brechtel failed to notify Dixilyn's employee at an earlier time to start lowering the legs. (R. 149).

The District Court expressly found that Dixilyn was not negligent to any extent and fully performed its function of lowering the legs in connection with Crescent's unsuccessful attempt to navigate the flotilla under the Natchez Bridge. (R. 147-149).

Having found that it was solely the negligence of Crescent's and the unseaworthiness of Crescent's Tug ORLEANS which caused this damage, the District Court then considered whether or not the contract required Dixilyn as owner of the craft towed to indemnify Crescent as the tower for the consequences of Crescent's own negligence. The District Court, following the rule which had been

stated by the Court of Appeals below on eight separate occasions, held that the contract did not express in clear and definite terms that Dixilyn intended to indemnify Crescent for the consequence of Crescent's own negligence.[3]

Since the District Court held that the contract did not evidence such an intention of the parties in the required unequivocal terms, it did not reach the question of whether or not such a contract relieving Crescent, as the tower of the barge, of liability for its own negligence was invalid under the public policy rule announced by this Court in the *Bisso*[4] and *Winding Gulf*[5] cases.

Upon Crescent's appeal from the judgment of the District Court, the Court of Appeals below reversed the District Court on the basis of the contractual agreement between the parties. In so doing, the Court of Appeals held:

> 1. That even though the language of the contract between the parties relating to indemnity was "doubtful and ambiguous" (R. 163) and even though an intention on the part of Dixilyn to indemnify Crescent was not stated in the contract in unequivocal terms as the Court of Appeals below had heretofore required,

---

[3] The District Court cited and relied on **Batson-Cook Company v. Industrial Steel Erectors,** 257 F. 2d 410 (C.A. 5, 1958), and **Standard Oil Company of Texas v. Wampler,** 218 F. 2d 768, (C.A. 5, 1955) in both of which the Court of Appeals below had expressly held that indemnity agreements are strictly construed against the indemnitee and that contracts would not be so construed unless the indemnitor's obligation to protect the indemnitee from his own negligence was expressed in unequivocal terms.

[4] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955).

[5] **Boston Metals Company v. SS Winding Gulf,** 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

that by looking to the correspondence, conferences and circumstances surrounding the execution of the contract, it was the intention of the parties that Dixilyn indemnify Crescent for the consequences of Crescent's own negligence. This is exactly opposite to the result reached by the District Court.

2. Having concluded not from the terms of the contract itself, but from extraneous circumstances that Dixilyn as owner of the towed barge had agreed to indemnify the tower for the consequences of the tower's own negligence, the Court of Appeals below then held that such a contract was not controlled by the rule announced by this Court in the *Bisso* and *Winding Gulf* cases that contracts relieving towers of liability for their negligence were invalid because contrary to public policy. The Court of Appeals below thus attempted to create an exception to this Court's public policy rule as announced in the *Bisso* and *Winding Gulf* cases.[6]

3. The Court of Appeals then considered another question not reached by the District Court with respect to the measure of damages to which Crescent might be entitled under the indemnity agreement. The Court of Appeals below again refused to follow one of its earlier decisions[7] and held that Crescent was entitled to reimbursement for the full amount of damages paid to the bridge rather than the damages actually sustained by Crescent which was limited solely to the cost of insurance then in effect protecting Crescent against any and all loses such as the damages to this bridge.

---

[6] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955); **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 122, 92 L. Ed. 933, 75 S. Ct. 629, 1955 A.M.C. 927 (1955)

[7] **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955).

Summary of Argument

I.

(Full Argument, *infra*, pages 13 to 21)

The holding of the Court of Appeals below that Dixilyn as owner of the towed drilling barge could validly contract to indemnify Crescent for liabilities arising out of Crescent's own negligence and the unseaworthiness of Crescent's tugs is directly contrary to the rule announced by this Court in the *Bisso*[8] and *Winding Gulf*[9] cases that a contract releasing a tower from all liability for its own negligence was invalid because contrary to public policy. The reasons advanced by this Court for the promulgation of such a public policy rule were twofold—to discourage negligence by making wrongdoers pay damages and to protect those in need of goods or services from being overreached by those who had power to drive hard bargains. While recognizing the public policy rule of *Bisso* invalidating such indemnity contracts, the Court of Appeals below attempted to create an exception to this rule primarily on the basis of some dictum contained in this Court's opinion in the *Southwestern Sugar & Molasses* case.[10] In *Southwestern Sugar & Molasses* this Court indicated that if the peculiar hazards involved in a towing operation were great and if the methods of guarding against those hazards were uncertain, it might be that some exception to the *Bisso* rule

---

[8] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955).

[9] **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

[10] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation**, 360 U.S. 411, 3 L. Ed. 2d 1334, 79 S. Ct. 1210 (1959).

would be indicated to deal with particularized circumstances.

The Court of Appeals below attempted to create an exception to the *Bisso* rule in this case when in fact neither of the two conditions precedent required by *Southwestern Sugar & Molasses* were present. In the instant case the hazards were not great, certainly no greater than the hazards confronting any tow passing through a bridge, and the method of guarding against the hazard of a collision with the bridge was not uncertain. The method of guarding against the hazard which resulted in the damages sued for in this case was quite simple—Crescent simply had to supply tugs with sufficient horsepower to stop and control the tow until the legs on the drilling barge could be lowered to the proper depth. Or as an alternative method of guarding against the hazard, Crescent simply had to make a test well above the bridge with the legs lowered to the contemplated depth for passage under the bridge to determine whether it had in fact supplied sufficient horsepower before attempting to navigate under the bridge.

Instead of creating an exception to the *Bisso* rule, this is a classic case for the application of the public policy rule of *Bisso*, particularly so since the rule was designed to discourage negligence by making wrongdoers pay damages. Crescent's conduct in this case—the complete failure to perform its obligation to supply sufficient horsepower to handle the tow, an obligation that was the very essence of its towage contract—graphically illustrates the need for the application to this case of the *Bisso* rule invalidating contracts which purport to release towers from liability for their own negligence.

II.

(Full Argument, *infra*, pages 22 to 34)

The Court of Appeals below held that since the language in the contract between Crescent and Dixilyn was doubtful or ambiguous on whether Dixilyn intended to indemnify Crescent for the consequences of Crescent's own negligence or for the unseaworthiness of Crescent's tugs, that it would look to correspondence, oral discussions, etc. between the parties in an attempt to try to ascertain their intention on the question of indemnity. In so holding, the Court of Appeals below declined to follow the general rule only recently reaffirmed in two decisions of this Court,[11] and followed in decisions from the Court of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits and in eight previous decisions of the Court of Appeals below. This general rule is that unless the intention to do so is unequivocally expressed in the plainest of words in the contract, the law will not consider that the parties intended for one of them to indemnify the other for the consequences of the other's own negligence.

The Court of Appeals below declined to follow this general rule even though only fourteen days before its decision in the present case it had reaffirmed it.[12]

Additionally, in construing the contract in this case the Court of Appeals below also completely ignored two well-established rules of law relating to the interpretation of indemnity contracts. These rules are:

---

[11] **Herd & Co. v. Krawill Machinery Corporation**, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959); **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 422, 92 L. Ed. 933, 75 S. Ct. 649 (1955).

[12] **Halliburton Company v. Norton Drilling Company**, 302 F. 2d 431 (C.A. 5, 1962).

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

The contract in this case was drafted by Crescent's own skilled admiralty counsel and even though it is a contract of indemnity, the Court of Appeals below did not strictly construe it against Crescent and in favor of the indemnitor, Dixilyn, as these two rules of contractual construction require.

If an exception is to be made to the public policy rule of *Bisso* that a towing company cannot contract away its liability for negligence, the least that should be required in the towage contract is that the language plainly and unequivocally provide that the craft being towed is assuming the tower's liability for the tower's own negligence or the unseaworthiness of the tower's vessel. If unusual liabilities such as negligence and unseaworthiness are to be passed on from the tower to the craft towed, the written contract between the tower and the craft towed should express this assumption of unusual liabilities by the craft towed in the plainest of terms. This has been the almost universal rule in this country.

III.

(Full Argument, *infra*, pages 34 to 36)

Upon concluding that Dixilyn had to indemnify Crescent, the Court of Appeals below held that Crescent's damages amounted to the sum that Crescent would be called

upon to pay to the bridge owners, notwithstanding the fact that Crescent had insurance coverages that would indemnify it for such payment. In so holding, the Court of Appeals below declined to follow its earlier decision in the *Wampler* case.[13] Had the Court of Appeals applied the same measure of damages in this case as it did in the *Wampler* case, Crescent would have been entitled to recover only the premiums paid by Crescent for the insurance which had indemnified it for the sum it had to pay the bridge in damages. Since we are concerned with making Crescent whole and not both Crescent and its insurance underwriters in this case, the loss actually sustained by Crescent was the premiums paid for the insurance and nothing more. This is the proper measure of damages in this case if Dixilyn is ultimately held liable to indemnify Crescent.

Argument

I.

No exception to this Court's Admiralty rule of law invalidating contracts releasing towers from liability for their own negligence should be created in this case.

In holding that Dixilyn as owner of the towed drilling barge could validly contract to indemnify Crescent's tugs for all liability to third parties for Crescent's own negligence, the Court of Appeals below attempted to create an exception to this Court's Admiralty rule of law, based on public policy, that such contracts were invalid. This rule invalidating such contracts was clearly enunciated by this Court in:

[13] **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955).

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955); and

Boston Metals Company v. SS WINDING GULF, 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

In the landmark *Bisso* case, this Court specifically held that a contract releasing a tower from all liability for its negligence which resulted in damage to the tow itself was invalid because contrary to public policy. In so doing, this Court stated that because of:

> ". . . judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[14]

On the same day in the *WINDING GULF* case,[15] this Court made it perfectly plain that a contract relieving a towing tug of all liability for its negligent navigation was contrary to public policy not only insofar as damages to the tow was concerned, but also with respect to damages of third parties caused by the negligence of the towing tug.

In declaring that a towing tug could not contract away its liability for its own negligence, this Court made it perfectly clear that there were two main reasons for the creation and the application of this rule. It stated them thusly:

[14] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 90, 99 L. Ed. 911, at page 917, 75 S. Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[15] **Boston Metals Company v. SS Winding Gulf,** 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

". . . (1) To discourage negligence by making wrongdoers pay damages, and

(2) To protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[16]

Notwithstanding this rule of law based on public policy, the Court of Appeals in the present case attempts to create an exception to this public policy rule and in doing so relies primarily on some dictum contained in this Court's decision in *Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation*, 360 U.S. 411, 3 L.Ed. 2d 1334, 79 S.Ct. 1210 (1959), a case in which this Court had under consideration a clause relieving a tower of liability for its negligence which had been filed as a part of a tariff with the Interstate Commerce Commission. After holding that such a clause in a tariff filed with the Interstate Commerce Commission should not be declared invalid without the Interstate Commerce Comission having had an opportunity to express its views, this Court indicated that the rule of *Bisso* might call for modification where an effective regulatory scheme controlled the liabilities of tug and tow. This Court then stated:

"If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, *it may be* that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their

[16] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 91, 99 L. Ed. 911, at page 918, 75 S. Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[17] (Emphasis supplied)

Apparently believing that this language meant that exceptions were to be made to the *Bisso* rule in certain circumstances, the Court of Appeals so held in this case when in fact the two conditions precedent to any such exception as stated by this Court in the *Southwestern Sugar & Molasses Company* case were not present. The two conditions precedent to creating an exception to the *Bisso* rule as stated in the *Southwestern Sugar & Molasses* case were:

1. That the peculiar *hazards* involved in towing a barge supplied by the shipper *be great.*
2. That the *methods of guarding* against those great and peculiar hazards *be uncertain.*[18]

---

[17] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[18] In both of the other cases cited and relied on by the Court of Appeals below in support of the exception it created to this Court's **Bisso** rule, the hazards excepted met both these tests—in both the hazards were great and the method of guarding against them was not only uncertain but non-existent if the barges were to be towed at all.

In the decision rendered before **Bisso** by the Second Circuit, **North River Barge Line v. Chile S.S. Co.,** 213 F. 2d 882 (1954), the great hazard was ice and the only method of guarding against it was not to tow the barge at all. Nevertheless, the tower did not seek to avoid its liability otherwise for its own negligent towage and the contract expressly provided only that the tower would not be liable for towing the barge in the ice. This is a far cry from the complete exoneration from liability for its own negligence which Crescent has been given by the Court of Appeals below in the present case notwithstanding this Court's rule to the contrary in **Bisso.**

Likewise, in the District Court case, **Chile Steamship Company**

Neither of these two factors is present in the instant case, for while this offshore drilling barge may have been unusual in its characteristics because of its legs, and therefore may have presented a peculiar hazard[19] in navigating underneath the bridges on the Mississippi River, this hazard was not great, and certainly was not a hazard in which the method of guarding against it was uncertain. The hazard was not great because by a simple adjustment in the position of the legs by either raising or lowering them to a proper depth in the water all bridges could be navigated with safety. And the method of guarding against the hazard of these legs on this drilling barge striking a bridge was not uncertain.

The method of guarding against this hazard, however peculiar it might have been, was both certain and simple indeed—Crescent simply had to supply tugs with sufficient

---

v. **The Justine McAllister**, S D N Y, 195 F Supp. 700 (1958), the great hazard of ice and there was in fact no method of guarding against the hazard of ice. Here again the tower assumed all liabilities for its own negligence and excluded only damages due to ice and the contract specifically so provided.

Whatever exception to **Bisso** might be justified where there is no method of guarding against a hazard such as ice, is of no significance here whereby the simple method of supplying tugs with sufficient horsepower to stop and control the tow, Crescent would have completely eliminated the hazard which resulted in the damage to the bridge.

[19] Even that it was a peculiar hazard, however, is extremely doubtful for in every passage under a bridge by any tug and tow the risk and possibility of a collision with the bridge is an ever present hazard.

It can hardly be said that the hazard here is any more peculiar than that existing when a single river tow boat navigates 30 or 40 barges at one time through a bridge such as this or when one or more tugs navigate a large deep sea vessel without its own power under a bridge such as this.

horsepower to hold the drilling barge stationary in the river while the legs were lowered to the depth that would permit them to clear the bridges. Certainly there is nothing uncertain as to the method that should have been employed by Crescent to completely eliminate any danger of the drilling barge striking a bridge. Sufficient horsepower was all that was required, and as the District Court found, Crescent wholly failed in its contractual obligation to provide a sufficient amount of horsepower to guard against this hazard. By simply adding an additional tug or using tugs of greater horsepower than those supplied, Crescent had the certain means of eliminating all possibility of an accident ever occurring such as is involved in this case.[20]

But this is not the only certain and simple method which Crescent had of eliminating this hazard, for by the simple expedient of testing the ability of the three tugs which it supplied to hold the drilling barge while the legs were lowered to the desired depth before it ever approached the bridge, Crescent could easily have ascertained that the three tugs it had supplied were not of sufficient horsepower to hold the barge while the legs were lowered. The District Court expressly held that Crescent negligently failed to make such a test above the bridge where there was adequate water for this purpose and where there would have been no danger of damage to anyone or anything in the process of making the test. (R. 149)

---

[20] Crescent supplied three tugs with engines that had a total of 6,375 horsepower (TOLTEC with 3,975 horsepower, OUACHITA with 1,800 horsepower and ORLEANS with 600 horsepower). Before taking the drilling barge under the Baton Rouge Bridge further down river, Crescent added a fourth tug with an additional 1,500 horsepower, making the total horsepower in going under the Baton Rouge Bridge equal 7875 horsepower an increase in horsepower by nearly 25%.

Instead of adopting these two certain and simple methods of guarding against the hazard of one of the drilling barge's legs coming in contact with the bridge, Crescent negligently failed to make any such test to determine the adequacy of the horsepower supplied and negligently supplied an inadequate amount of power to perform the towing contract which it undertook.

The very essence of the contract which Crescent made with Dixilyn was the supplying of sufficient power to perform the towing operation without damage to the drilling barge or to the bridges across the river. It not only negligently failed to employ these two certain and simple methods of guarding against this particular hazard, but it was also negligent in supplying the Tug ORLEANS in an unseaworthy condition because of its defective engine which failed above the bridge at the crucial moment.

Rather than creating an exception to the *Bisso* rule when neither of the conditions precedent to such an exception as set out by this Court in *Southwestern Sugar & Molasses*[21] are present, this is a classic case for the application of the public policy rule of *Bisso*, and particularly so because such a public policy rule was felt necessary by this Court primarily to discourage negligence by making wrongdoers pay damages in these days when "the dangers of modern machines makes it all the more necessary that negligence be discouraged."[22]

---

[21] **Southwestern Sugar & Molasses Company, Inc. v. River Terminal Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[22] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85 at page 91, 99 L. Ed. 911, at page 918, 75 S. Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

The negligence of Crescent in furnishing an unseaworthy tug, in supplying insufficient power, and in failing to make a test to determine if the power it had supplied was sufficient, is a flagrant, yes, almost willful disregard of the contractual obligations which it assumed as a matter of law when it agreed to tow the barge. Whatever the economic factors may be, and regardless of how many other towing concerns may have been interested in performing this towage for Dixilyn,[23] the fact remains that the *Bisso* rule was clearly and plainly designed to discourage and do away with the very kind of negligence of which Crescent was guilty in this case, and Crescent's attempts to contract away its liability for its own negligence must be declared invalid as contrary to public policy.

Until the decision of the Court of Appeals below in this case, clauses which attempted to release towers such as Crescent from liability for their own negligent towage were invalid, and the creation of an unwarranted exception to this Court's public policy rule of *Bisso* such as was attempted by the Court below must inevitably lead to great uncertainty and confusion in the maritime law relating to towage contracts—uncertainty and confusion that can only be resolved on a case to case basis after a full trial on the

[23] Crescent has repeatedly contended that Crescent was in no position to overreach Dixilyn or to drive a hard bargain because it offered some evidence that there were other competing towing companies who did the same type of towage. However the really crucial evidence necessary to sustain this contention is completely absent from the record—there is no evidence that any of Crescent's competitors would have undertaken the towage under a contract that would have made the tower liable for its own negligence and for the unseaworthiness of its own tugs. So far as this record shows all of Crescent's competitors would have been trying to obtain the same release from liability that Crescent sought.

merits of every damage claim arising out of every towage contract.

It is respectfully submitted that where a rule of law is founded squarely and steadfastly on public policy as is true of the *Bisso* rule, that the exceptions to this rule, if any, must be few and far between and that any exception must at the very least meet both conditions precedent to such an exception—(1) that the hazards be great, and (2) the method of guarding against them uncertain—set forth by this Court in *Southwestern Sugar & Molasses.*[24] The hazards were not great, and the method of guarding against the hazards were not uncertain, but simple indeed—Crescent simply had to supply sufficient power to control the drilling barge at all times. Certainly a tower such as Crescent here should not be permitted to contract away its liability for negligently failing to supply enough power to perform the very towing operations which were the essence of its contractual obligation.[25]

---

[24] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[25] In this respect it is strikingly similar to the essence of the contract which this Court relied on to imply as a matter of law a duty on a stevedoring contractor to indemnify the shipowner for damages arising out of the failure of the stevedoring contractor to perform its stevedoring services in a reasonably safe and workmanlike manner. See **Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,** 350 U.S. 124, at page 133, 100 L. Ed. 133, at page 142, 76 S. Ct. 232 (1956).

If the law implies indemnity as was done in **Ryan,** for even stronger reasons an exception to **Bisso** should not be made to permit a tower to contract away its liability where it has negligently failed to perform its duty to supply sufficient power which is the very essence of the towing contract.

II.

If exception is to be made to Bisso rule, contract must clearly express in unequivocal terms intent of craft being towed to indemnify Tower for consequences of Tower's own negligence

The holding of the Court of Appeals below that since the contract did not express plainly and unequivocally an intention that Dixilyn would indemnify Crescent for the consequences of Cresent's own negligence, but rather was doubtful or ambiguous on this point, that the Court would then look to the correspondence and meetings and circumstances leading up to the execution of the contract to ascertain the intention of the parties, is directly contrary to the general rule applied in *two* recent decisions of this Court, in decisions from the Courts of Appeal for the First, Second, Seventh, Eighth and Ninth Circuits, and in *eight* previous decisions of the Court of Appeals below.

The two decisions of this Court are:

> *Herd & Co. v. Krawil Machinery Corp.*, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959);
>
> *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649 (1955).

Quoting the rule directly from *THE WINDING GULF* case, this Court stated in *Herd & Co.*:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed . . . for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence, unless the clarity

> of the language used expresses such to be the understanding of the contracting parties.' "[26]

The same unequivocal language required in the contract itself by this Court before one tort feasor can pass on its liability for its own negligence to an innocent party is also required by the Courts of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits.[27]

Prior to the present decision, that this was clearly the law on this point "not only generally, but . . . in the Fifth Circuit as well,"[28] had been plainly reaffirmed by the Court of Appeals below only four short years ago when it said:

> ". . . that while it need not be done in any particular language or form, unless the intention is unequivocally

---

[26] **Herd & Co. v. Krawill Machinery Corp.**, 359 U.S. 297, at page 305, 3 L. Ed. 820, at page 825, 79 S. Ct. 766 (1959).

[27] First Circuit:
Turner Construction Company v. W. J. Halloran Steel Erection Co., 240 F. 2d 441 (1957).

Second Circuit:
Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (1947), cert. denied 332 U.S. 700, 92 L. Ed. 355, 68 S. Ct. 82 (1947).

Miller v. Pennsylvania Railroad Company, 236 F. 2d 295 (1956).

Seventh Circuit:
Chicago & N. W. Ry. Co. v. Chicago Packaged Fuel Company, 195 F. 2d 467 (1952), cert. denied 344 U.S. 832, 97 L. Ed. 648, 73 S. Ct. 39 (1952).

Eighth Circuit:
Ocean Accident & Guarantee Corp. v. Jansen, 203 F. 2d 682 (1953).

Ninth Circuit:
Wallace v. U. S., 18 F. 2d 20 (1927).

[28] **Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F. 2d 410, at page 412 (C.A. 5, 1958).

expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence."[29]

That such an intention to indemnify a party against its own negligence had to be unequivocally expressed in the contract itself was first enunciated by the Court of Appeals below in 1935,[30] was reaffirmed twice in 1950,[31] once in 1951,[32] once in 1953,[33] and twice in 1955,[34] prior to its decision in *Batson-Cook* in 1958 from which the rule has heretofore been quoted. When the language of the contract in this case is compared with the contractual language of the decisions of this Court, of the other Courts of Appeals and of these eight earlier decisions of the Court below, it is abundantly clear that the written contract in this case does not meet the general rule of those cases that the intention to indemnify Crescent against its own negligence must be unequivocally expressed in the plainest of terms. The only thing in writing evidencing any intention of

---

[29] **Batson-Cook Company, Inc. v. Industrial Steel Erectors,** 257 F. 2d 410, at page 412 (C.A. 5, 1958).

[30] **Southern Bell Telephone & Telegraph Co. v. Mayor and Board of Aldermen of City of Meridian, Mississippi,** 74 F. 2d 983 (C.A. 5, 1935).

[31] **Martin v. American Optical Company,** 184 F. 2d 528 (C.A. 5, 1950); **Halliburton Oil Well Cementing Co. v. Paulk,** 180 F. 2d 79 (C.A. 5, 1950).

[32] **W. C. Shepherd Co. v. Royal Indemnity Co.,** 192 F. 2d 710 (C.A. 5, 1951).

[33] **Thomas v. Atlantic Coastline Railroad Company,** 201 F. 2d 167 (C.A. 5, 1953).

[34] **Standard Oil Company of Texas v. Wampler,** 218 F. 2d 768 (C.A. 5, 1955); **Alabama Great Southern Railroad Company v. Louisville & Nashville Company,** 224 F. 2d 1 (C.A. 5, 1955).

Dixilyn to indemnify Crescent for any purpose in this case is contained in the following language:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us (Crescent) from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and the account of your underwriters." (Parenthetical expression added)[35]

Realizing that this language could not meet the unequivocal terms required by its eight previous decisions,[36]

---

[35] All of the contract which was in writing in this case is quoted in the opinion of the Court of Appeals and consists of Crescent's letter of December 23, 1957 with the sentence eliminated as shown in the Court's opinion (R. 159). The earlier letter from Crescent of December 19, 1957, with its attached Tower's Release Clause quoted in the opinion of the Court of Appeals below (R. 157-159), was rejected by Dixilyn.

[36] The contractual language in this case purported to **"release and relieve"** Crescent **"from any liability"** and from **"any damage claims urged by third parties."**

A brief look at the contractual language construed by the Court of Appeals in these eight earlier cases as not being sufficiently clear to require one party to indemnify another party for the consequences of its own negligence will quickly demonstrate why the Court of Appeals below had to make such a startling reversal in its approach to these indemnity contracts if it was to reach the result it did in this case:

1. In **Batson-Cook**, the indemnity clause provided for indemnity against **"any and all losses"** and **"to defend any suit"** and **"to pay all damages"**. The Court of Appeals below held that this language was not sufficiently clear to show the intent of the indemnitor to indemnify the indemnitee against losses arising out of the indemnitee's own negligence and expressly said that the word **"all"** did not include liabilities

the Court of Appeals below sought to avoid the rule of its eight decisions by stating that the holdings of those eight cases simply meant the failure to refer specifically to negligence in an indemnity agreement was only some evidence of an intention not to indemnify against such losses. In the present case, the Court of Appeals below thus took the absence of an expression in unequivocal terms simply as one of the factors to be considered in determining the intent

---

arising out of the indemnitee's own negligence. 257 F. 2d 410 (C.A. 5, 1958).

2. In the **Wampler** case, the language employed was against **"any" loss,** and it was held that it failed to meet the requirement of the law that an agreement to indemnify or insure a party against its own negligence had to be expressed in unequivocal terms. 218 F. 2d 768 (C.A. 5, 1955).

3. In the **Shepherd** case, the language employed in the contract was to save harmless the surety from **"all costs, expense, loss or damage"**, and to repay the surety **"all monies expended"** under the contract. The Court of Appeals held that this language could not be construed to indemnify the surety against losses resulting from its own wrongdoing. 192 F. 2d 710 (C.A. 5, 1951).

4. In the **Martin** case, the contract provided that the lessor release the lessee from **"any and all damages"**. The Court of Appeals below held that this language did not require the lessee to indemnify the lessor against the lessor's own negligence, since there was no unequivocal expression of such intention. 184 F. 2d 528 (C.A. 5, 1950).

5. In the **Halliburton Oil Well** case, the contract provided that the indemnitee **"shall not be responsible for damages or losses of any kind whatsoever . . . whether resulting from the acts or omissions"** of the indemnitee. The Court of Appeals below held this language was not sufficient to require the indemnitor to pay for the indemnitee's negligence because such obligation had not been expressed in the contract in "unequivocal terms." 180 F. 2d 79, at page 84 (C.A. 5, 1950).

6. In the **Southern Bell Telephone Company** case, the indemnitor assumed **"all liabilities"** and agreed to indemnify the indemnitee against **"any and all loss or damage"**. In hold-

of the parties to a contract of indemnity, and proceeded to create for the Fifth Circuit an entirely new rule—that if an indemnity agreement does not cover the indemnitee's negligence plainly and unequivocally as had previously been required, that the Court would then consider the negotiations between the parties, the correspondence and other circumstances surrounding the consummation of the contract in an attempt to ascertain if the parties intended to

---

ing this language not sufficiently clear to require the indemnitor to pay for the indemnitee's negligence the Court of Appeals below said:

"It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms." 71 F. 2d 983, at page 984 (C.A. 5, 1935).

7. In the **Alabama Great Southern Railroad Company** case the contract provided for indemnity against **"any loss . . . in whatever manner the same may be caused or occasioned, whether by or through the negligence" of the indemnitee "or otherwise".** The Court of Appeals below held that this specific language although it referred to negligence was not sufficiently clear to cover "all losses" but was only sufficiently clear to require the indemnitor to pay for the indemnitee's simple negligence, and this Court expressly held that this language "could not properly be construed as intended to extend, or extending, to damage occasioned by willful conduct or wanton negligence" on the part of the indemnitee. 224 F. 2d 1, at page 4 (C.A. 5, 1955).

8. In the **Thomas** case, the indemnity clause in the contract provided that the lessor would be indemnified against **"any and all"** claims **"whether the same is the result of fire caused by negligent emission of sparks from the locomotive engines of lessor, or otherwise, however resulting."** The Court of Appeals below also held in this case that this language was sufficiently clear to cover only the simple negligence of the lessor, but was not sufficiently clear or explicit to evidence an intention that the lessee pay for the claims resulting from the lessor's willful or wanton negligence. 201 F. 2d 167 (C.A. 5, 1953).

do that which they did not say. What a tremendous and fantastic and unjustified reversal of a well-established rule of law this was!

The result is all the more shocking and inexplicable when two of the same panel of three judges[37] who decided the present case had only fourteen days before expressly stated that the general rule is:

> ". . . that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms."[38]

Thus did the same panel of Circuit Judges reaffirm the general rule enunciated by the eight previous decisions of this Court. Yet in the present case the same Circuit Judges hold that if the intention to indemnify is not in fact expressed in these unequivocal terms in the contract, then the Court will examine extraneous evidence in an attempt to determine whether the parties had actually intended to do that which they did not express in the unequivocal terms required by this Court's earlier decisions.

It is impossible to understand how the same panel of Judges sitting on the same Court can in the space of fourteen days reaffirm the general rule and then completely emasculate it by saying that if the parties do not comply with the rule, the Court will consider extraneous circumstances to see if, in fact, the parties intended their silence

---

[37] Chief Judge Tuttle and Circuit Judge Wisdom. Circuit Judge Rives who wrote the opinion in the present case dissented but on other grounds.

[38] **Halliburton Company v. Norton Drilling Company**, 302 F. 2d 431, at page 436 (April 25, 1962).

to be equivalent to what the Court had said so many times before had to be expressed in unequivocal terms in the contract.

What an incongruous and chaotic result this is! It is respectfully submitted that the rule announced by the Court of Appeals below in the present case which requires a Court to look into the negotiations, correspondence, etc. leading up to the execution of an indemnity contract in an effort to determine whether one party agreed to indemnify another party for its own negligence, is unsound, unjust, impractical and fosters great uncertainty in the interpretation of contracts which leads inevitably to endless litigation in an attempt to ascertain the intention of the parties which should have been plainly stated in the contract itself.

The sound administration of justice requires that when the purpose of a contract is to impose the extraordinary liability for the tower's negligence or the unseaworthiness of its tugs on the craft towed that this purpose and intention be spelled out in unmistakable terms in the contract itself. It is only by such a requirement that contracting parties, their attorneys and the Courts can know in situations such as this what unusual liabilities are being assumed, if any, by the parties to a contract.

If an exception is to be created to the *Bisso* rule that a towing company cannot contract away its liability for negligence, it is respectfully submitted that contracting parties in the position of Dixilyn in this case are at least entitled to the protection of the rule which requires that contracts specifically provide in the plainest of language that the towed barge is assuming the tower's liability for the tower's negligence or the unseaworthiness of the tower's

vessels. Certainly this is not too much to ask of a party who drafts the contract such as Crescent did in this case.[39] The need for this to be plainly expressed is further emphasized when it is remembered that the basic rule of *Bisso* makes such provisions contrary to public policy and only exceptional circumstances may possibly create an exception to this public policy rule. Clearly if the liability is one that cannot be passed on unless an exception to the public policy rule of *Bisso* is made, it is all the more reason why such liability for negligence should not be passed from one party to another without the written contract expressing it in the plainest of terms.

Court below also ignored two well established rules of contractual construction

The Court of Appeals construed the contract in this case in complete and utter disregard of two well-established rules of law in interpreting indemnity clauses in contracts. These two rules which are so well settled that the citation of authority is unnecessary are:

---

[39] That both Crescent and its skilled admiralty counsel well knew the definiteness required by the courts to pass on Crescent's liability for its own negligence or the unseaworthiness of its tugs to Dixilyn is amply demonstrated by the language contained in Crescent's standard "Tower's Release Clause", (Deft. Ex. 4A; R. 23, 40, 158) which was proposed by Crescent as a part of the contract but was not included because Dixilyn flatly declined to accept it. (R. 92). Crescent's "Tower's Release Clause" provides that the craft towed will indemnify Crescent for certain damages from **"any cause whatsoever, including loss or damage caused by negligence** of the Master, pilot and crew of the towing craft and our employees, agents and representatives." This definite language which would have eliminated any controversy was not included by Crescent in the contract accepted by Dixilyn obviously because Dixilyn had already refused to agree to it. Thus Crescent attempted to saddle Dixilyn with Crescent's liabilities by indirection after it saw that Dixilyn would not agree to it directly.

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

Without dispute the language employed in the letter constituting the contract in this case is that of Crescent as supplier of the tugs and, in fact, was language drafted by its own skilled admiralty counsel with full knowledge of the decisions of this Court, of the other Courts of Appeals and of the eight previous decisions of the Court of Appeals below which had expresly held that to pass on the unusual liability of the tug's negligence to its tow that the contract had to express it in the plainest of language. Rather than strictly construing the contract drafted by Crescent's own admiralty counsel, the Court of Appeals does not construe the language at all, but holds that the language used by Crescent's counsel is not what the law required, and is in fact doubtful and ambiguous as to the intention of the parties. Instead of applying the general rule that no indemnification was intended because of this doubt and ambiguity, the Court of Appeals below proceeds to look to extraneous evidence completely outside the contract in an attempt to determine the intention of the parties. It is impossible to imagine a more liberal construction of a contract in favor of the party who drafted it rather than against it as the law requires than has been made by the Court of Appeals in this case.

But the error of the Court of Appeals below does not stop here, but rather it is compounded by its refusal to

follow still another tenet of contractual interpretation, a rule that it had firmly reiterated itself on five separate occasions since 1947. This is the rule of contractual construction of indemnity agreements that provides that they must be construed strictly in favor of the indemnitor, in this case the drilling barge being towed. In 1947 the Court of Appeals below stated this rule thusly:

> "On the other hand, it is certainly the general rule, that, where the indemnity is not contracted for from an insurance company whose business is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business, and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."[40]

On four subsequent occasions, the Court below has reaffirmed this rule of construction of indemnity contracts.[41]

---

[40] **Employers Casualty Company v. Howard P. Foley Company**, 158 F. 2d 363, at page 364 (C.A. 5, 1947).

[41] In **Halliburton Oil Well Cementing Company v. Paulk**, 180 F. 2d 79 (C.A. 5, 1950) the Court said in part at page 84:

> "In considering this claim of indemnity we must bear in mind the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee. . . . This is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in unequivocal terms."

In **Martin v. American Optical Company**, 184 F. 2d 528 (C.A. 5, 1950) the Court stated at page 529:

> "This Court has had recent occasion to point to the strictness with which indemnity provisions are construed in favor of the indemnitor."

In **Thomas v. Atlantic Coast Line Railway Company**, 201 F. 2d

Contrary to the rule it had expressly stated on no less than five separate occasions since 1947, the Court of Appeals below not only did not strictly construe the indemnity provisions in the contract in favor of the indemnitor (the vessel being towed), but in fact did not construe the indemnity provisions of the contract at all, but rather attempted to ascertain the intention of the parties by looking to the conferences, correspondence and other surrounding circumstances connected with the contractual agreement. This it did without any reference whatsoever to the rule it had so often stated that a contract of indemnity had to be construed strictly in favor of the indemnitor.

---

167 (C.A. 5, 1953) the Court reiterated its earlier holding in **Employers Casualty v. Foley**, 158 F. 2d 363 (C.A. 5, 1947) in almost identical language:

> "It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract but is from one not in the indemnity business and is an incident of a contract whose main purpose is something else the indemnity provision is construed strictly in favor of the indemnitor." 201 F. 2d 167, at page 169 (C.A. 5, 1953)

In **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955) the Court stated in part at page 770:

> "On briefs Appellants recognized the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee, and that is particularly true where the result would be to indemnify against one's own negligence, and that it will not be so construed unless such obligation is expressed in unequivocal terms. But Appellants say, 'the intention of the party to indemnify against the indemnitee's negligence need not be expressly stated in the contract provided it otherwise clearly appears in the language used.' There is nothing wrong with Appellants' statement of the rules. The difficulty is that, construing the contract strictly, the indemnity claim is not expressed in unequivocal terms."

When these two tenets of contractual construction, which are particularly appropriate when the unusual liabilties of negligence of the indemnitee and the 'unseaworthiness' of its vessels are sought to be passed on to another, are applied to the contractual language used in this case by Crescent's own counsel, the error of the Court of Appeals below is as plain and unequivocal as the language it had heretofore required in an indemnity contract before it would pass on the liability of an indemnitee for its own negligence to an indemnitor.

III.

If exception to be made to Bisso rule, and if contract is in unequivocal terms, the proper measure of damages is the cost to Crescent of the insurance it had covering the damages to the bridge

While it is not anticipated that the Court will reach this issue, but will reverse the Court of Appeals below for the reasons heretofore stated, if such is not the result, it is respectfully submitted that the Court of Appeals below used an improper measure of damages in this case.

The Court of Appeals below held that Dixilyn was liable to Crescent for the full amount of damages paid by Crescent to the owners of the bridge. In so doing it applied an entirely different measure of damages from that applied by it under identical circumstances in *Standard Oil Company of Texas v. Wampler*, 218 F. 2d 768 (C.A. 5, 1955). Had the Court applied the measure of damages set out by it in the *Wampler* case, Crescent's damages would have been assessed on the basis of the costs paid by Crecent for

it own insurance which covered the sums it had to pay to the bridge in damages.

It was stipulated in the District Court that this towage and the damages sustained by the bridge in this case were fully covered by Crescent's normal insurance policies and that no extra insurance was either required or taken out by Crescent (R. 55). Thus, it is abundantly clear that if Dixilyn must indemnify Crescent, Crescent's loss is not the amount of damages paid by it to the bridge owner, but rather the amount paid by Crescent to its insurance underwriter for the insurance which in turn paid the damages to the bridge. We are here concerned not with any agreement to indemnify both Crescent and its underwriters, but only with a possible agreement to indemnify Crescent itself. We are not concerned with making both Crescent and its insurance underwriters whole if Dixilyn must indemnify Crescent, but with what sum of money is necessary to make Crescent alone whole for the damages paid to the bridge. Clearly Crescent's only expenditure was the insurance premium it paid for the insurance coverage it had to protect it against claims such as those made by the bridge in this case.

While the Court of Appeals below attempts to distinguish its holding in the *Wampler* case from the present case, it is a distinction without substance, for even if Crescent had been specifically notified by Dixilyn that it was not providing insurance coverage for Crescent, there would have been no need for Crescent to obtain any additional insurance coverages since it was already fully insured for damages such as this under its regular insurance policy.

It is, therefore, respectfully submitted that the Court of Appeals below erred in declining to follow its earlier decision in the *Wampler* case and if this issue is reached by this Court, that the proper measure of damages be fixed at the cost of the premiums paid by Crescent for its insurance which fully indemnified Crescent for the damages sustained by the bridge.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals below should be reversed and this matter remanded for the sole purpose of determining whether the fact findings of the District Court holding Crescent solely at fault for the collision with the bridge are clearly erroneous. Since the Court of Appeals held that Dixilyn had to indemnify Crescent for Crescent's own negligence, it did not consider Crescent's claim in the Court of Appeals below that the trial court's findings of sole fault on Crescent were clearly erroneous.

While the evidence in the record not only sustains, but forcefully compels the finding of sole fault against Crescent made by the District Court, as the Court of Appeals below did not consider Crescent's contention to the contrary in its original opinion, it is apparently

necessary for this Court to remand it to the Court below for his purpose.

Respectfully submitted,

E. D. Vickery
877 San Jacinto Building
Houston 2, Texas

Wilbur H. Hecht
27 William Street
New York 5, New York
Attorneys for Petitioner

Of Counsel:

Royston, Rayzor & Cook
877 San Jacinto Building
Houston 2, Texas

Mendes & Mount
27 William Street
New York 5, New York

December ____, 1962

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for Petitioner have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Lemle & Kelleher, 1836 National Bank of Commerce Building, New Orleans 12, Louisiana and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the the same in the United States Post Office with First Class Air Mail postage prepaid to the addresses shown above on this the ____ day of December, 1962.

Of Royston, Rayzor & Cook